



**C.M.A.(MD).No.604 of 2020**

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

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**DATED : 30.03.2023**

**CORAM:**

**THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR**

C.M.A(MD)No.604 of 2020

and

C.M.P(MD) No.6241 of 2020

A. Thiyagarajan (Died)

1. Tamilarasi

2. Rajan Sambath

3. Rani @ Arulmozhi

..... Appellants/ Respondents 3  
to 5/ Defendants 3 to 5

-VS-

1. Muthukannu

... 1<sup>st</sup> Respondent/Appellant/Plaintiff

2. The Bank of India

Pappanadu Branch,

Represented by its Branch Manager,

Pappanadu,

Orathanadu Taluk and Munsif

Thanjavur District.

.... 2<sup>nd</sup> Respondent /2<sup>nd</sup> Respondent/  
2<sup>nd</sup> Defendant

**PRAYER:** Civil Miscellaneous Appeal filed under Order 43 Rule 1 of Civil Procedure Code, against the judgment and decree, dated 25.11.2019 in



**C.M.A.(MD).No.604 of 2020**

A.S.No.20 of 2016, on the file of the Subordinate Judge, Pattukottai reversing the judgment and decree, dated 30.01.2016 in O.S.No.52/2009, on the file of the District Munsif cum Judicial Magistrate, Orathanadu.

For Appellants : Mrs.AL.Gandhimadhi  
Senior Counsel for  
Mr.C.Mahadevan  
For Respondents : Mr. D.Sivaraman  
for R1

### **J U D G M E N T**

The present appeal has been filed by the defendants 3 to 5 in a suit for declaration of title and recovery of possession challenging the order of remand passed by the first appellate Court.

2. The plaintiff had filed O.S.No.52 of 2009, on the file of the District Munsif-cum-Judicial Magistrate Court, Orathanadu for the relief of declaration of title and recovery of possession.

3. It is the case of the plaintiff that an extent of 1.09 acres in S.No. 527/2B1 within a larger extent of 3 acres 4 cents, originally belonging to one Kulandai Mathuran. After his death, it devolved upon his five sons, All the



**C.M.A.(MD).No.604 of 2020**

five sons have entered into an oral partition in the year 1940, in which, 61 cents were allotted the share of Veerappa Mathuran, who is the grand-father of the plaintiff. The other 61 cents were allotted to the share of Ayyasamy Mathuran. It is the further case of the plaintiff that the wife of Adaikalam Mathuran namely Balayee had purchased 48 cents from Kulandai Mathuran son of Ammamuthu Mathuran. In view of the said purchase, the family of Adaikala Mathuran is entitled to 1.09 acres in S.No.527/2B1.

4. It is the further case of the plaintiff that S.No. 464/1 having an extent of 1.01.02 acres also originally belongs to one Kulanthai Mathuran and after the death of said Kulanthai Mathuran it devolved upon his five sons. In the partition, 20 cents was allotted to the share of Adaikala Mathuran. Wife of Adaikala Mathuran, viz., Balayee had purchased 20 cents from Kulanthai Mathuran son of Ammamuthu Mathuran. Therefore, the family of Adaikala Mathuran, is entitled to 40 cents in S.No. 464/1 in these two items of the property . The plaintiff had contended that they are exclusively entitled to the said property. According to the plaintiff they were in possession of the property upto the year 2008 and they were dispossessed by the first defendant in the suit and hence the present suit for declaration of title and for recovery



**C.M.A.(MD).No.604 of 2020**

of possession.

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5. The defendants have contended that suit property did not belong to Kulanthai Mathuran, but on the other hand absolutely belonged to Ayyasamy Mathuran and after his death it devolved upon his son of Rajappa Mathuran. The first defendant is none other than the nephew of the Rajappa Mathuran. Therefore, the first respondent had claimed that he is the owner of the property in S.No.464/1. Further, the first defendant has contended that the Rajappa Mathuran had executed a registered settlement deed in his favour on 19.12.1974 with regard to S.No.527/2. With the above said contention, the parties went for trial.

6. The trial Court found that the plaintiff has not established the title over the suit schedule property and has proceeded to dismiss the suit. The plaintiff had filed A.S.No.20 of 2016 before the Sub-Court, Pattukottai. The learned Sub-ordinate Judge after appreciating the oral and documentary evidence ultimately arrived at a finding in paragraph No.24 that without discussing the true issues and without proper appreciation, the trial Court has decided the suit. The first appellate Court by invoking the power under Order



**C.M.A.(MD).No.604 of 2020**

WEB COPY

41 Rule 25 of C.P.C had framed two issues. Thereafter, proceeded to remand the matter back to the trial Court. This order of remand is under challenge in the present appeal by the defendants 3 to 5 herein.

7. According to the learned Senior Counsel appearing for the appellants the issues that are sought to be framed by the first appellate Court, have already been framed by the trial Court as issue Nos.2 and 3 and there is no necessity for again to frame the same issues and remitting the case back to the trial Court. The learned Senior Counsel appearing for the appellants further contended that when the entire oral and documentary evidence is available before the first appellate Court the first appellate Court ought to have re-appreciated the evidence and decided the matter on merits without remitting the matter back to the trial Court.

8. Per contra, the learned counsel appearing for the respondent had contended that the first appellate Court had reversed all the findings of the trial Court and thereafter, the first appellate Court ought to have allowed the appeal, dismissing the suit. The trial Court ought to have allowed the appeal and decreed the suit as prayed for and unnecessarily two issues have been



**C.M.A.(MD).No.604 of 2020**

WEB COPY

framed by the first appellate Court.

9. I have carefully considered the submissions made by the learned counsel on either side.

10. A perusal of the judgment of the first appellate Court clearly indicates that from paragraph Nos.14 to 23, the first appellate Court had proceeded to discuss about the judgment and decree of the trial Court and it has reversed all the findings of the trial Court. However, in Paragraph No.24, the first appellate Court had framed two issues invoking the power under Order 41 Rule 23 of C.P.C and has decided to remit the matter back. When the power under Order 41 Rule 25 of C.P.C has been invoked, the first appellate Court ought to have retained the appeal on its file and should have only called for a report from the trial Court, after recording oral and documentary evidence based upon the issues framed by the first appellate Court. However, on an erroneous appreciation of law the first appellate Court had remanded the entire matter back to the trial Court. Therefore, this Court is of the view that the order of remand is not in consonance either under Order 41 Rule 23 or under Order 41 Rule 25 of C.P.C.



**C.M.A.(MD).No.604 of 2020**

WEB COPY

11. It is settled position of law that an order of remand is an extraordinary course which cannot be adopted as a matter of course unless the first appellate Court arrives at a finding based upon the oral and documentary evidence, that the suit cannot be decided.

12. In the present case, there are no findings of the first appellate Court that the evidence is lacking and the first appellate Court is not in a position to arrive at any findings. In fact, the first appellate Court has expressed various findings in paragraph No.14 to 23. In view of the above said facts, this Court is of the view the order of remand is not in consonance either under Order 41 Rule 23 or Order 41 Rule 25 of C.P.C.

13. In view of the above said deliberations, the appeal is allowed the order of remand is set aside the matter is remitted back to the file of the first appellate Court/Sub Court, Pattukottai, to decide the appeal afresh on merits and in accordance with law, based upon the existing oral and documentary evidence already available before the Court after granting opportunity to both the parties. The appeal shall be disposed of within a period of four months



**C.M.A.(MD).No.604 of 2020**

from the date of receipt of a copy of this order.

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14. Accordingly, the Civil Miscellaneous Appeal stands allowed. There shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

**30.03.2023**

NCC : Yes/No  
Index : Yes / No  
Internet : Yes / No  
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To

1. The Subordinate Judge,  
Pattukottai.
2. The District Munsif cum Judicial Magistrate,  
Orathanadu.
3. The Bank of India  
Pappanadu Branch,  
Represented by its Branch Manager,  
Pappanadu,  
Orathanadu Taluk and Munsif  
Thanjavur District.
4. The Section Officer,  
Vernacular Records,  
Madurai Bench of Madras High Court,  
Madurai.

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**C.M.A.(MD).No.604 of 2020**

**R.VIJAYAKUMAR,J.**

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**C.M.A.(MD)No.604 of 2020**

**30.03.2023**



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**C.M.A.(MD).No.604 of 2020**